Supreme Court, U. S.
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No. 79-1022

In the Supreme Court of the United States

OCTOBER TERM, 1979

IRA L. PATRICK AND MAISIE S. PATRICK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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The question presented in this federal income tax case is whether petitioner Ira Patrick[1] was entitled to deduct living expenses, incurred at a construction site located away from his personal residence, and transportation expenses, incurred in traveling between his personal residence and his place of employment, as business expenses under Section 162(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C.).

The pertinent facts are undisputed and may be summarized as follows: Petitioner was employed as a welder on the construction of a nuclear power plant near Lusby, Maryland, while maintaining his personal

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[1]Petitioner Maisie S. Patrick is a party solely because she filed joint income tax returns with her husband for the years at issue.

residence in Creswell, North Carolina. He lived near the construction site five days each week and returned to his personal residence on weekends (Pet. App. 4-6). At the time petitioner began work on the power plant, he did not know how long the employment would last and he did not have an employment contract (Pet. App. 6). He worked at that construction site for approximately 34 months before he voluntarily terminated his employment (Pet. App. 4-5).

On his 1974 federal income tax return, petitioner claimed a business expense deduction of $8,162 under Section 162(a)(2) of the Code for the cost of meals and lodging incurred while living near the construction site and the cost of travel between the construction site and his personal residence in Creswell, North Carolina (Pet. App. 6). On audit, the Commissioner of Internal Revenue disallowed the deduction and determined a deficiency of $1,802.75 (Pet. App. 3). In this action brought by petitioner for redetermination of the deficiency, the Tax Court held that petitioner's employment at the construction site was "temporary," and that his living expenses and transportation costs were therefore deductible business expenses (Pet. App. 3-10). The court of appeals reversed. It ruled that petitioner had failed to show that his employment was not of indefinite duration. The court concluded that its previous decision in *Commissioner* v. *Peurifoy*, 254 F. 2d 483 (4th Cir. 1957), aff'd, 358 U.S. 59 (1958), was controlling on the question of deductibility of such expenses (Pet. App. 11-13).

1. The court of appeals correctly held that petitioner's living and travel expenses were not deductible. Section 162(a)(2) allows a deduction for traveling expenses, including amounts expended for meals and lodging, incurred by a taxpayer while away from home in the pursuit of a trade or business. For federal income tax purposes, a person's home is his principal place of employment, not where his personal residence is located. *Owens* v. *Commissioner*, 50 T.C. 577, 580 (1968); *Kroll* v. *Commissioner*, 49 T.C. 557, 561-562 (1968). If a taxpayer elects for personal reasons to reside away from his place of employment, traveling and living expenses incurred as a result of such an election are considered nondeductible personal expenses. *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). See Section 262 of the Code.

The only exception to the rule that expenses of transportation from a residence to a place of employment and living expenses, incurred by a taxpayer because he resides away from his place of employment, are nondeductible personal expenses is when the taxpayer's employment is temporary in duration. *Commissioner* v. *Peurifoy*, *supra*; *Blatnick* v. *Commissioner*, 56 T.C. 1344, 1348 (1971); Rev. Rul. 60-189, 1960-1 Cum. Bull. 60.[2] With respect to temporary employment, the taxpayer's "tax home" is deemed to be his personal residence despite the fact that his business is at another location.

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[2]Employment is considered temporary only if it can be expected to last for a short period of time. *Tucker* v. *Commissioner*, 55 T.C. 783, 786 (1971). Even if it is known that a particular job may or will terminate at some future date, that job is not considered temporary for purposes of Section 162(a)(2) if it is expected to last for a substantial or indefinite period. *Ford* v. *Commissioner*, 227 F. 2d 297 (4th Cir. 1955); *Jones* v. *Commissioner*, 54 T.C. 734 (1970), aff'd, 444 F. 2d 508 (5th Cir. 1971); *Boone* v. *United States*, 482 F. 2d 417 (5th Cir. 1973); *Slegers* v. *United States*, 603 F. 2d 225 (9th Cir. 1979) (table); cf. *Frederick* v. *United States*, 603 F. 2d 1292 (8th Cir. 1979).

Accordingly, a taxpayer engaged in temporary employment located away from his personal residence is considered to be "away from home" for purposes of Section 162(a)(2). Living and transportation expenses incurred in pursuit of temporary employment are therefore deductible business expenses.

As this Court recognized in *Commissioner* v. *Peurifoy*, *supra*, 358 U.S. at 60-61, the question whether a taxpayer's employment is temporary or indefinite is factual. Review by this Court of the decision below would therefore be inappropriate. At all events, the facts of record recounted above amply support the court of appeals' determination that taxpayer's employment at the construction site was of indefinite duration.[3]

2. *Frederick* v. *United States*, 603 F. 2d 1292 (8th Cir. 1979), aff'g 457 F. Supp. 1274 (D.N.D. 1978), upon which petitioner relies (Pet. 7), does not conflict with the decision below. In *Frederick*, the court applied the same legal standards as the decision below in determining whether the taxpayer's employment was temporary or indefinite. There, as here, the court recognized that the ultimate determination whether a taxpayer's employment is temporary or indefinite is a question of fact. The court's conclusion in *Frederick* that the taxpayer's employment was temporary merely reflects its application of the same legal principles to the different factual

[3]The instant case was consolidated for briefing and argument with two other cases involving the same issue presented in similar factual settings. See *Babeaux* v. *Commissioner*, 36 T.C.M. 657 (1977), and *Waldrop* v. *Commissioner*, 36 T.C.M. 780 (1977). On December 10, 1979, this Court denied certiorari in *Waldrop* (No. 79-5418).

circumstances involved in that case. Thus, while the two courts reached different results, their decisions do not conflict.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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